BOOK REVIEWS.

THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY. An Historical Essay on the Boundaries Between English Legislation and Adjudication in England. By Charles Howard McIlwain. New Haven: Yale University Press. 1910. pp. xiv, 408.

It is a great mistake to say that learning makes no progress. This work is a study of that side of the English Parliament which is and always has been the highest court in the kingdom; and incidentally of the later growth of Parliament as a law-making body, its legislative side increasing as its judicial side disappeared. On several luminous thoughts, such as the modernity of the sharp distinction between legislative and judicial, between law making and law declaring, little known or considered in early England; on the importance of using words, not as we know them, with their modern connotations, but as known to our ancestors, thus not distorting ancient institutions into modern ones; Professor McIlwain has based a study which, wholly in the line of modern thought, is yet far away from the position of Blackstone or even later commentators, and, I think, no less accurate for being more profound. In his preface the writer notes the absence of law *making* in early England, even after the Conquest, "the law was declared rather than made. . . . Was a body of custom which in time grew to be looked upon as a law fundamental." And much of the book is given to showing how ancient is the principle that statutes inconsistent with this fundamental law might be void; so declared, if not always by an ordinary court, at least by the high court of Parliament, and not necessarily that Parliament which enacted the rule in question. In these earliest times there was absolutely no distinction, or even understanding, of the differences between governmental activity, as legislative, judicial, or administrative. Parliament participated in all these functions. The law resides in the people, and the judges speak the law; thus it is the law of a *court*, the law expressed by the suitors, in the court behind a great man's castle (hence the name of court — *curia*) is the law of the people legitimately expressed, "judge-made" in the oldest times; and Acts of Parliament were merely the similar judgments of another, if higher, court. The writer is careful to state that he does not mean to follow his investigations into America; but does not refrain at the proper point from a luminous suggestion, as that — "It may well be doubted whether the doctrine of parliamentary sovereignty in any form that means much can long survive the triumph of democracy" (p. xv). The House of Lords itself is at the moment demanding a *referendum* in England. Furthermore, the adoption of the *referendum* and of authoritative instructions will not only do away with sovereign parliament but with party lines, — with the old two-party system. So may we hope at last to follow Washington's warning against parties — "The common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it" (p. xvii).

It is a vexatious habit of reviewers to seem to add learning of their own, or at least to differ, albeit in minor particulars, from the learning set before them; but the reader primarily wishes to know what is in the book, not other people's differences, however excellent. Professor McIlwain's book is devoted to five chapters; an introduction wherein he treats of written constitutions, of judicial review of legislation, the transfer of this notion to America, the source of law making in early England — upon which he takes what we may call the English rather than the Roman or Norman view — the growth and nature of the Great Council, the nature also of *Magna Carta* which "is first of all a feudal document and not a national one" (p. 14), the growth of the King's courts, the differences

between them and the Council, the meaning of the word "Parliament" and of the thing itself and the superseding of its jurisdiction by that of the House of Lords. The second chapter is upon "The Fundamental Law"; the third and longest, "Parliament as a Court"; the fourth upon "The Relations of 'Judiciary' and 'Legislature'"; and the fifth is entitled "The Political History of Parliamentary Supremacy."

Like most writers to-day Professor McIlwain finds the common law a people's law, not the order of a sovereign, even of a sovereign Parliament. "The common law was thus in the main the product of a court, not of a legislature" (p. 44). Inquests may declare the customs of the realm, assizes adjudge them, but it is a long time before the assize becomes a statute or is recognized as such. The charters of the Norman kings profess always to secure rights already existing; the assizes relate to matters of procedure. "Such customary laws as these, declared by inquest or by Council, hardly ever ostensibly altered, with no assignable beginning, must almost of necessity in process of time acquire a character of inviolability." . . . "In this process of development, the idea of the traditional law is never lost. At first it may be the privileges of the few that are treasured as inalienable and fundamental, but even these 'liberties,' though they may at first be actually licenses to oppress the mass of the people, are in a future time to prove the greatest inheritance of the nation. For these liberties are rights, and rights imply an immunity from arbitrary authority of which the nation may avail itself when it has come into being. They carry with them the idea of government under law instead of limitless discretion" (pp. 52–53). The author wisely notes that one of the confirmations of the Charters, that of 1368, is in these words: "It was 'assented and accorded, That the Great Charter and the Charter of the Forest be holden and kept in all points; and if any Statute be made to the contrary, that shall be holden for none'" (p. 59). It is only recently that the learning of American constitutional lawyers has progressed beyond Gladstone's trite, shallow, and misleading *dictum*. Many later instances are given, many examples of a fundamental law recognized not only in the decisions of high courts of the Parliament but in statutes as well. Even in Bracton's time there was a body of law that the king could not alter, and it is only since the radical thought of the Revolution that the same may not be said of Parliament. In vain could Richard II say his "laws were in his mouth"; in vain James I say, "although we have never studied the common law of England, yet are we not ignorant of any points which belong to a king to know" (p. 80). And again to his Parliament in 1607, "Let your Lawes be looked into for I desire not the abolishing of the Lawes, but onley the clearing and sweeping off the rust of them" (p. 74). "Where the statutes have not altered the positive law," says Noy, "but have only increased or decreased the punishment thereof, they have done great good, but where they have altered the common law in substance, they have done great harm" (p. 74). The common law remained the victor. "The clause in the Act of Settlement which changes the tenure of judges (to a life tenure) is justly regarded as one of the most important parts of the Revolution settlement. When the settlement of questions involving almost the very existence of the state depended upon the bare decision of the King's judges, and their own tenure of office upon the favor of the King, it is not strange that the oracles were sometimes suspected. . . . When the King could descend to personal encounter with one of them, 'looking and speaking fiercely with bended fist, offering to strike him,' because that judge 'humbly prayed the King to have respect to the Common Lawes of his land,' it is little wonder that even the inflexible Coke should fall 'flatt on all fower' and humbly beg the King's pardon and compassion."

Perhaps the most novel, hence to the ordinary reader the most profound of these essays is that upon Parliament as a Court, to which the reader can only be referred as the best present monograph on this little understood subject. It covers 148 pages, being, indeed, the greater part of the book.

The fourth chapter on "The Relations of 'Judiciary' and 'Legislature,'" is closely connected with it. "The idea that law can be made is also very modern" (p. 300). Parliament, therefore, was far more a court than a legislature; this is the fundamental thought; and the antithesis between the English and the American Constitutions is more lucidly explained than in most books. The predominance is pointed out, in America, of the old notion that there was a constitution, a fundamental law above the legislatures protecting the people, shown in many subjects and writings before the Revolution, notably the words of James Otis — "An act against the constitution is void" in his arguments against writs of assistance; "and there it was destined [the older theory] to continue and influence the course of government and the decisions of courts for generations; but in England the life had gone out of the theory, and parliamentary omnipotence occupied the whole field" (pp. 309–310). There is some very fresh and needed writing on the neglected subject of the constitutional basis of the doctrine against the delegation of the legislative power, of the reasons why continental countries adopt administrative law, and England and ourselves, until very recently, rejected it. "The outcry over the 'forty days' tyranny' in 1776, when Chatham by an Order in Council laid an embargo on grain, showed the feeling of Parliament on such matters. The present agitation in the United States over 'Government by Commission' is due in part to a similar feeling." The separation of the powers is also discussed; one of the principles which Continental countries have taken over, from Montesquieu, and so completely that in them the courts may not judge between the constitution and the law; and there is a valuable note upon the delegation of power by Parliament (p. 318) — "The feeling in the United States against 'Government by Commission' extends not merely to commissioners appointed without statutory warrant, but also to those based upon an act of Congress. This involves the constitutional question as to the ability of Congress to delegate its legislative power, a subject recently much discussed. In the Parliaments of the Norman period this question could hardly arise. Even so late as the reign of Edward I, we have found the Council making laws after the rest of the Parliament had gone home."

The last chapter on "The Political History of Parliamentary Supremacy," lasting at most from the Revolution to the present Parliament, and of an actual sovereignty, lasting from Hobbs to Austin — not quite so long — is mainly historical; reaching over to America and showing how for once a lack of political theory, a poverty of new political ideas prevented Englishmen from grasping the idea with sufficient rapidity that a charter of a trading company was not an adequate bridle for an English commonwealth beyond the seas. "All this furnished a remarkable parallel to the break-down of the Roman constitution under the Republic, caused by the fiction that the local laws of a city could be spread thin enough to do duty as a constitution for the greater part of the civilized world" (p. 365).

So we may close this review of a most interesting book with one of its luminous apperceptions, "There is no gift more rare than the power to interpret contemporary events, except, possibly, the ability to understand past ones."

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